

BANKRUPTCY: THE CASE FOR RELIEF IN AN ECONOMY OF DEBT

A decade after the Global Financial Crisis and Great Recession, developed economies continue to struggle under excessive household debt. While exacerbating inequality and political unrest, this debt—when combined with wage stagnation and a shrinking welfare state—has played a key role in maintaining economic growth and allowing households faced with rising costs of living to make ends meet. In *Bankruptcy: The Case for Relief in an Economy of Debt*, Joseph Spooner examines this economic model and finds it increasingly unsustainable. In a call to action to reduce debt burdens, he turns to bankruptcy law, which is uniquely situated as a mechanism of social insurance against the risks of a debt-dependent economy. This book should be read by anyone interested in understanding the problem of consumer debt and how best to address it.

JOSEPH SPOONER is an Assistant Professor at the London School of Economics Law Department. He researches issues of law, policy and politics relating to household debt and over-indebtedness. He has worked on the World Bank's Report on the Treatment of the Insolvency of Natural Persons (2013) and the Law Reform Commission of Ireland's project on personal debt management (2010-2012). He has published articles on the law and politics of bankruptcy and household debt in leading journals including the *Journal of Law and Society* and *The Modern Law Review*.

INTERNATIONAL CORPORATE LAW AND FINANCIAL
MARKET REGULATION

Corporate law and financial market regulation have major implications for how the modern economy is organised and regulated and for how risk is managed and distributed – domestically, regionally and internationally. This Series seeks to inform and lead the vibrant scholarly and policy debate in this highly dynamic area by publishing cutting-edge, timely and critical examinations of the most pressing and important questions in the field.

Series Editors

Professor Eilis Ferran, University of Cambridge

Professor Niamh Moloney, London School of Economics
and Political Science

Professor Howell Jackson, *Harvard Law School*

BANKRUPTCY: THE CASE
FOR RELIEF IN AN
ECONOMY OF DEBT

JOSEPH SPOONER

London School of Economics and Political Science



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press
978-1-316-61777-9 — Bankruptcy: The Case for Relief in an Economy of Debt
Joseph Spooner
Frontmatter
[More Information](#)

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
314-321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi - 110025, India
103 Penang Road, #05-06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of the University of Cambridge.
It furthers the University's mission by disseminating knowledge in the pursuit of
education, learning and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781316617779
DOI: 10.1017/9781316711484

© Joseph Spooner 2019

This publication is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without the written
permission of Cambridge University Press.

First published 2019
First paperback edition 2022

A catalogue record for this publication is available from the British Library

Library of Congress Cataloging in Publication data

Names: Spooner, Joseph Tobias, 1985– author.

Title: The law of consumer bankruptcy : a critical approach / Joseph Spooner, London School
of Economics and Political Science.

Description: Cambridge, United Kingdom ; New York, NY, USA : Cambridge University
Press, 2019. | Series: International corporate law and financial market regulation | Based on
author's thesis (doctoral – University College, London, 2014) issued under title: Personal
insolvency law in the modern consumer credit society : English and comparative
perspectives. | Includes bibliographical references and index.

Identifiers: LCCN 2018049855 | ISBN 9781107166943 (hardback)

Subjects: LCSH: Bankruptcy – England. | Debt relief – England. | Consumer credit – Law and
legislation – England. | Bankruptcy – Economic aspects. | Finance, Personal – Government
policy | BISAC: LAW / Corporate.

Classification: LCC KD2139 .S69 2019 | DDC 346.4207/8–dc23

LC record available at <https://lccn.loc.gov/2018049855>

ISBN 978-1-107-16694-3 Hardback

ISBN 978-1-316-61777-9 Paperback

Cambridge University Press has no responsibility for the persistence or
accuracy of URLs for external or third-party internet websites referred to in
this publication, and does not guarantee that any content on such websites is,
or will remain, accurate or appropriate.

Cambridge University Press
978-1-316-61777-9 — Bankruptcy: The Case for Relief in an Economy of Debt
Joseph Spooner
Frontmatter
[More Information](#)

To Henrietta, Jenni and Seamus.

CONTENTS

<i>List of Figures</i>	<i>page</i>	xii
<i>Preface and Acknowledgments</i>		xiii
1	Introduction	1
1.1	The Debt Economy: Household Debt and Crises of Financialised Capitalism	1
1.1.1	Debt and Economic Stagnation	7
1.1.2	Debt and Inequality	8
1.1.3	Debt and Political Instability	11
1.1.4	The Case for Debt Relief	13
1.2	An Indebted Society: High Household Debt Levels and Over-Indebtedness	15
1.2.1	Household Debt Levels	15
1.2.2	Distribution of Household Debt	17
1.2.3	Debt and Over-Indebtedness	20
1.3	A Law of Consumer Bankruptcy	23
1.4	Debt Overhang and the Limits of Bankruptcy	31
1.5	Conclusion	34
2	Financialised Capitalism and the Centrality of Household Debt	37
2.1	Eras of Capitalism: Political Economy of the Household Debt Expansion	37
2.1.1	Post-War Consensus in Keynesian Demand Management	39
2.1.2	The Neoliberal Turn and Inflation Targeting	41

- 2.1.3 Neoliberal Regulation and the Legal Foundations of a Debt-Dependent Economy 42
- 2.1.4 Neoliberal Regulation, Market Innovation and the Consumer Lending Revolution 49
- 2.1.5 Justifying a Debt-Dependent Economy 51
- 2.2 Contradictions of the Debt-Dependent Economy 53
 - 2.2.1 Privatised Keynesianism and Loans for Wages 53
 - 2.2.2 Credit/Welfare Trade-Off 54
 - 2.2.3 'Let Them Eat Credit': A Time-Limited Credit Consensus 56
- 2.3 Conclusions 61
- 3 Consumer Bankruptcy Theory and the Case for Debt Relief 65
 - 3.1 Introduction: Ambivalent Aims and an Identity Crisis of Personal Insolvency Law and Policy 65
 - 3.1.1 Bankruptcy: Debt Collection or Debt Relief? 66
 - 3.1.2 Bankruptcy: Commercial Law or Social Safety Net? 69
 - 3.2 Developing a Hierarchy of Policy Priorities 73
 - 3.2.1 Creditor Wealth Maximisation and Bankruptcy as Debt Collection 77
 - 3.2.2 Consumer Credit Market Failures and the Creditors' Bargain Model 80
 - 3.2.3 Externalities 86
 - 3.3 Bankruptcy as Social Insurance 93
 - 3.4 Objections to Debt Relief 97
 - 3.4.1 Moral Hazard 98
 - 3.4.2 'Lenders Should Feel Able to Advance Money' 99
 - 3.4.3 A True Tragedy: The Practice of Bankruptcy When There Is Nothing Left to Collect 102
 - 3.5 Conclusions: The Case for Debt Relief 105
- 4 A Consumer Bankruptcy Marketplace 112
 - 4.1 Introduction: The Retreat of English Consumer Bankruptcy Law 112

CONTENTS

ix

- 4.2 Debtor Choice and the Structure of English Law 118
- 4.3 ‘Vanishing’ Bankruptcy: Restricted Access to Public Provision 122
- 4.4 Individual Voluntary Arrangements: Contractual Bankruptcy 130
 - 4.4.1 The Market Dominance of the IVA 131
 - 4.4.2 Facilitating the Consumer Bankruptcy Market 133
 - 4.4.3 Judicial Shaping of the IVA ‘Product’: Contractual Bankruptcy and Creditors’ Bargains 137
- 4.5 Conclusion 143
- 5 The Limits of Contractual Consumer Bankruptcy 147
 - 5.1 ‘Market-Based Debt Resolution’ and Post-Crisis Consensus 147
 - 5.2 The Consumer Bankruptcy Market 149
 - 5.3 Failures in the Consumer Bankruptcy Market 154
 - 5.3.1 Intermediation and Principal-Agent Problems 154
 - 5.3.2 Contracting Failures and the Limits of Consensual Household Debt Restructuring 158
 - 5.4 Conclusions 167
- 6 The Austere Creditor: Austerity, Bankruptcy Policy and Government Debt Collection 174
 - 6.1 Introduction 174
 - 6.2 Household Debt at a Time of Austerity 176
 - 6.2.1 Austerity Policies, Increased Household Financial Difficulties and ‘Priority Debts’ 176
 - 6.2.2 The Austere Creditor: Austerity and Government Debt Collection 181
 - (I) Social Welfare Debt: A Tightening Social Safety Net 181
 - (II) Local Government Debt 183

	(III) The Austere Creditor in Context: Privatisation, Commercialisation and the Neoliberal State	184
6.2.3	Implications for Bankruptcy	186
6.3	Testing the Law's Insurance Function in the Face of Austerity and Recession	188
6.3.1	Priority Debts in Personal Insolvency	188
6.3.2	Government as (Priority) Creditor: Council Tax Collection and Local Authority Creditor Petitions	192
6.3.3	Litigating State Immunity from the Fresh Start	200
6.3.4	The <i>Sharples</i> Decision and Bankruptcy in a Housing Crisis	205
6.5	Extending Bankruptcy's Social Insurance Function to Government Debts	207
6.6	Conclusions	213
7	Moral Hazard and Bankruptcy Abuse Prevention	216
7.1	Introduction	216
7.1.1	The 'Very Bedrock' of Bankruptcy Law	216
7.1.2	The Household Debt Expansion and the Reasonableness of Consumer Borrowing in a Debt-Dependent Economy	219
7.1.3	Neoliberalism, Financialisation and the Responsible Financial Consumer	220
7.2	Moral Hazard, Debtor Misconduct and Bankruptcy 'Abuse'	222
7.2.1	The Politics and Morality of Moral Hazard	222
7.2.2	Moral Hazard as a Policy Tool	225
7.3	Addressing Moral Hazard under English Law	227
7.3.1	The Cost of Debt Relief: Designing Incentives	227
7.3.2	Bankruptcy Restrictions Orders and Undertakings	232
7.4	Limitations of the Bankruptcy Restrictions Order/ Undertaking System in Addressing Moral Hazard	236

CONTENTS

xi

7.4.1	Applying a Historical Commercial System to Contemporary Consumer Debtors	237
7.4.2	Financialised Capitalism, New Public Management and the Enforcement of Bankruptcy Law	239
	(i) Procedural Problems: Contractualisation and the Limits of Consumer Plea Bargaining	239
	(ii) The Bankruptcy Restriction Order/Undertaking Regime and 'Post-Democratic' Governance: Performance Targets and Political Communication	243
7.4.3	Indeterminate Standards and Difficulties in Determining <i>Reasonable</i> Borrowing Behaviour	247
7.5	Moral Hazard and Judging the Reasonableness of Consumer Borrowing Behaviour	250
7.5.1	Household Borrowing in the Debt Economy	250
7.5.2	Moral Hazard and the Allocation of Responsibility for Consumer Insolvency	252
7.6	Forgiveness, Discipline and the Privatisation of Credit Morality	256
7.6.1	'Market-Based Debt Resolution' and Forcing Debtors to 'Do the Right Thing'	258
7.6.2	Credit Reporting in Contemporary Surveillance Capitalism	261
7.7	Conclusion	267
8	Conclusion	271
8.1.	Bankruptcy as Social Insurance in a Debt-Dependent Economy	272
8.2.	The Logical and Political Limits of English Bankruptcy Law	274
8.3	Social Insurance of Last Resort or a Right Not to Pay One's Debts?	278
	<i>Index</i>	282

FIGURES

- 1.1 Household debt as percentage of GDP. Source: Bank for International Settlements. *page 5*
- 1.2 Household debt as percentage of disposable income. Source: OECD. **6**
- 1.3 ‘Household Debt Inequalities’, 4 April 2016. Source: Office for National Statistics. **20**
- 3.1 Despite relatively high numbers of creditor petitions, bankruptcy is primarily invoked by debtors. Source: Insolvency Service. **102**
- 3.2 Consumer debtors are the majority users of bankruptcy. Source: Insolvency Service. **103**
- 3.3 Most debtors entering bankruptcy have few, if any, assets available for liquidation. Source: Insolvency Service. **104**
- 4.1 While IVAs grow in number, bankruptcy declines. Source: The Insolvency Service. **114**
- 4.2 Mandatory v. consensual personal insolvency procedures, 2005–2017. Source: The Insolvency Service. **115**
- 4.3 Most debtors entering bankruptcy have few, if any, assets available for liquidation. Source: The Insolvency Service. **116**
- 4.4 Personal insolvency percentage year-on-year growth, 2001–2017. Source: Compiled by author from The Insolvency Service data. **133**
- 5.1 Individual Voluntary Arrangements ongoing by number of years since registration. Source: Compiled by author from The Insolvency Service data. **165**
- 5.2 IVAs by ‘Completed’, ‘Terminated’ and ‘Ongoing’ status. Source: Insolvency Service. **166**
- 6.1 In recent years, creditor petitions have risen as a proportion of total bankruptcies. Source: Insolvency Service. **193**
- 6.2 Outcomes of Local Government Ombudsman decisions in complaints relating to bankruptcy. Source: Local Government and Social Care Ombudsman. **199**
- 7.1 Respective percentages of bankruptcy restrictions and director disqualifications obtained via undertakings. Source: Insolvency Service. **242**
- 7.2 Types of misconduct alleged in BRO/U cases. Source: Insolvency Service. **257**

PREFACE AND ACKNOWLEDGMENTS

Ten years ago, I began a role as a legal researcher at the Law Reform Commission of Ireland, where my brief was a project on the enforcement of judgment debts. This seemed like quite an interesting aspect of civil procedure and a topic that would allow some exploration of how issues of private law and the administration of justice impact on social and economic life. After two weeks on the job, the Lehman Brothers bank collapsed. Within the first month, the Irish banking system followed suit, leading the Irish Government to issue a blanket guarantee of Irish banks' liabilities. Suddenly questions of how the law regulates household debt and default became more obviously pressing and captivating matters, and this research project was quickly expanded to a wider enquiry, including proposals to overhaul Irish bankruptcy law. If this was perhaps a dramatic beginning to a research career and a vivid introduction to the political, economic, social, and legal significance of household debt, it was merely indicative of the realisations regarding the role of debt in our economy with which we all (and particularly those of my generation) were confronted following the Global Financial Crisis of 2008 and Great Recession. This book is a product of this experience, both personal and societal.

Many debts have been incurred in the writing of this book. Particular thanks are due to Professor Ian Fletcher, who sadly passed away during the completion of this project. Professor Fletcher supervised my Ph.D project in which many ideas explored in this book were first developed. His work has been an inspiration and his generous mentorship offered a wonderful introduction to the academic world. It is a great regret that he will not read this book. I also thank Alison Diduck, Robert Stevens, Nigel Balmer, Lucinda Miller and the University College London Faculty of Laws for their help and encouragement during my Ph.D studies. I am very grateful to my colleagues at the LSE Law Department, many of whom have read and commented on drafts of various chapters. Neil Duxbury, Niki Lacey, Paul MacMahon, Susan Marks, Niamh Moloney,

Linda Mulcahy, Sarah Paterson, Nick Sage, and Edmund Schuster have been particularly generous and constructive.

Special thanks are due to Iain Ramsay, who contributed greatly to the development of the book through insightful comments and many detailed discussions. I also thank for their input and encouragement Stephanie Ben-Ishai, Susan Block-Lieb, Jason Kilborn, David Milman, Saul Schwartz and Ted Janger. The Household Finance Collaborative Research Network, convening at the Law and Society Association annual meeting, has been an excellent forum for discussing ideas developed in the book. I remember in particular the contribution to this group of Jean Braucher, who is sadly no longer with us. I also thank Melbourne Law School (particularly Paul Ali, Lucinda O'Brien, Ian Ramsay and John Tobin) and Queensland University of Technology School of Law (particularly Ros Mason, Nicola Howell and Michael Murray), where I spent periods during the writing of this book. I thank Dr José Garrido for inviting me to participate on the World Bank Insolvency and Creditor/Debtor Regimes Task Force project on the Treatment of the Insolvency of Natural Persons, from which I obtained valuable insight. Ideas explored in this book have been discussed to varying degrees in articles in the *Journal of Law and Society* and the *Modern Law Review*, and I thank the editors and reviewers of these publications. I am also grateful for the support and understanding of Cambridge University Press staff including Matt Galloway, Jackie Grant, Kim Hughes and Gemma Smith, as well as series editors Eilis Ferran, Niamh Moloney and Howell Jackson.

My family have been a huge help and support throughout my studies and career, and I am very grateful to my parents Caitríona and Jody, and siblings Álmáth, Muirne, Eithne and Cormac.

Henrietta Zeffert has been a fount of inspiration, patience, insight, and encouragement throughout this project. I am immensely grateful for her belief and support.

All errors and omissions remain my responsibility.